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NOTES.

ADMISSION OF PAROL EVIDENCE IN MITIGATION OF DAMAGES FOR BREACH OF COVENANT OF SEISIN.—In an action for breach of a covenant of seisin the measure of damages is the value of the land at the time of the sale, the best estimate of which is found in the consideration paid. The plaintiff is limited in his recovery to the purchase price with interest. Applying this rule in connection with the doctrine that the consideration recited in a deed may always be inquired into, except for the purpose of defeating the conveyance, the Supreme Court of Illinois recently reached an interesting result. The defendant had conveyed land to the plaintiff with a covenant of seisin although he had previously conveyed to a third person the coal and minerals beneath the surface. In an action brought on the covenant the defendant pleaded that the plaintiff knew at the time of the execution of the deed to him that a severance of the estate had been made by the previous conveyance of the coal to another, and also that the entire consideration paid by the plaintiff had been given for the surface of the land only. The plaintiff's demurrer was overruled on the ground that the evidence was admissible not in contradiction of the covenant but in mitigation of damages. The court, refusing to go into the question of mistake, as the action was at law, gave the plaintiff nominal damages. *Lloyd* v. *Sandusky* (1903 Ill) 68 N. E. 154.

The same result as in the principal case was reached in *Leland* v. *Stone* (1813) 10 Mass. 459 and *Nutting* v. *Herbert* (1857) 35 N. H. 120. The rule for the measure of damages, which in some states is different for the different covenants of a deed, was one of the determining factors on the question of admissibility. The breach of the covenant of seisin occurs as soon as the deed takes

effect; therefore the measure of damages is the value of the land at the date of the purchase. As the parties at that time agreed upon a fair value, that value, which is the consideration actually paid is arbitrarily adopted as the measure of damage. Sedgwick on Damages (8th ed.) § 966 and cases cited. Since the recital of the consideration is not conclusive the plaintiff to increase his damages may prove the true consideration to have been greater than that stated in the deed, while the defendant may show it to have been smaller. *Belden* v. *Seymour* (1831) 8 Conn. 304; *Bingham* v. *Weiderwax* (1848) 1 N. Y. 509. If there has been a breach of the covenant as to part of the land conveyed the measure of damages is part of the consideration money, in the proportion of the value of the tract lost to the value of the entire tract. *Dunn* v. *Marston* (1852) 34 Me. 376; *Guinotte* v. *Chouteau* (1863) 34 Mo. 154. If the consideration, when all the land is lost, may be inquired into in order to determine the damages, it would seem logical to admit evidence to prove the consideration actually paid for any particular tract, in order to measure the damages to the plaintiff because of the loss of that portion of the land. This line of reasoning was followed in *Leland* v. *Stone*, supra, *Nutting* v. *Herbert*, supra, and in the principal case. See also *Barns* v. *Learned* (1830) 5 N. H. 264; *Siders* v. *Riley* (1859) 22 Ill. 110 and Rawle on Covenants (5th ed.) §§ 173–174. According to previous decisions of the Illinois court there were two distinct tracts of land in the principal case, one lying over the other. *Catlin Coal Co.* v. *Lloyd* (1898) 176 Ill. 275 and id. (1899) 180 Ill. 398.

In actions on the covenant against incumbrances the question of admissibility of parol evidence has more frequently arisen. In such cases the defendant seeks to escape liability on the covenant by proving that at the time of the conveyance the plaintiff orally agreed that a particular incumbrance should be excluded from the covenant. The general rule is that such evidence is inadmissible. It directly contradicts the covenant. *Suydam* v. *Jones* (1833) 10 Wend. 184; *Harlow* v. *Thomas* (1833) 15 Pick. 66; *Long* v. *Moler* (1855) 5 Ohio St. 271; *Myers* v. *Munson* (1884) 65 Iowa 423; *Edwards* v. *Clark* (1890) 83 Mich. 246. The reason which secured its admission in actions on the covenant of seisin does not apply in an action on a covenant against incumbrances. In such an action, though in some states limiting the amount of the recovery, the consideration is not the measure of damages and it is therefore immaterial whether it was in fact given for a broader or narrower covenant. This is recognized in *Spurr* v. *Andrew* (1863) 6 Allen 420 distinguishing *Leland* v. *Stone*, supra. See also *Estabrook* v. *Smith* (1856) 6 Gray 572. In a few states parol evidence is admissible in these cases on the ground that thereby an additional consideration on the part of the plaintiff is proved, viz. an engagement by him to pay an outstanding incumbrance which is verbally excepted from the covenant. *Allen* v. *Lee* (1848) 1 Ind. 58; *Dearborn* v. *Morse* (1871) 59 Me. 210; *Landman* v. *Ingram* (1872) 49 Mo. 212. See Rawle on Covenants (5th ed.) §§ 88, 89.